**No. F085403**

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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**GHOST GOLF, INC., DARYN COLEMAN, SOL Y LUNA MEXICAN CUISINE, AND NIEVES RUBIO,**

*Petitioners and Appellants*, v.

**GAVIN NEWSOM**, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA, **XAVIER BECERRA**, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, **SANDRA SHEWRY**, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, **ERICA S. PAN**, IN HER OFFICIAL CAPACITY AS ACTING STATE PUBLIC HEALTH OFFICER,

*Respondents*.

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On Appeal from the Superior Court of Fresno County
Case No. 20CECG03170

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# APPLICATION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AND THE GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS

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## APPLICATION TO FILE *AMICI CURIAE* BRIEF

To the Honorable Presiding Justice of the Court of Appeal, Fifth Appellate District:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Competitive Enterprise Institute and the Goldwater Institute respectfully applies for leave to file an *amici curiae* in support of Petitioners Ghost Golf, Inc., et al.[1]

The Competitive Enterprise Institute (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, it has done so through policy analysis, commentary, and litigation.

Ensuring that laws are passed through democratically accountable legislatures rather than abusive or unconstitutional executive fiat is critical to ensuring the free markets and constitutionally limited government that CEI was established to protect.

The Goldwater Institute was founded in 1988 as a nonpartisan public policy foundation devoted to private property rights, free markets, and constitutional liberty. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and appears as amicus curiae in courts

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[1] The proposed brief was authored by counsel for the Competitive Enterprise Institute based on a prior brief, with his permission, authored by Timothy Sandefur attorney for the Goldwater Institute. No other counsel or party made a monetary made a monetary contribution intended to fund the preparation or submission of the brief or authored the brief in whole or in part.

nationwide in cases involving these values. It has participated in litigation involving the states' responses to COVID across the country, including Arizona (*Next Level Arcade v. Pima County*, No. 20210057 (Pima Cnty. Super. Ct. filed Jan. 5, 2021) and Pennsylvania (*Paradise Conceps v. Wolf*, No. 2:20-cv-677 (W.D. Pa.)—and in this Court at an earlier stage of this case.

The *amici* file this friend of the court brief to emphasize the lack of any statutory or constitutional basis for the chronic-crisis doctrine in California's or America's legal tradition. Instead, this Court should follow the analysis used by the Michigan, Wisconsin, and Kentucky Supreme Courts. Under that analysis this Court should look to (1) the duration of the emergency power, (2) the scope of the emergency authority, (3) the operation of the legislature during the emergency, (4) whether the crisis is acute or chronic, and (5) the public accountability for the actions taken. When viewed in this light, the actions taken are contrary to law.

Accordingly, *amici* respectfully urges this Court to grant this application and file the attached *amici curiae* brief.

Respectfully submitted,

Dated: November 20, 2023

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## *AMICI CURIAE* BRIEF

## INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last few years, businesses in the State of California have withstood waves of shutdowns, partial shutdowns, and occupancy restrictions – based on a series of extraordinary and unprecedented exercises of state power. At one time, the State of California justified these exercises of power because of its quarantine authority: this was the theory described in its *Blueprint*. But a shutdown is fundamentally different from a quarantine. Administration of a quarantine necessarily requires individualized assessments: more precisely, it requires particularized assessments of particular circumstances, so that those assessments may lead to individualized detention or confinement. In contrast, the waves of shutdowns and related measures were like shotgun blasts covering everyone in a large field, not like a rifle shot aimed at an individualized target. In short, the authority that the shutdown was (and its progeny of policies were) based on cannot be grounded in the State's quarantine authority.

The theory of shutdown authority that the State's actions implied is essentially unsupported in California law or American law. That theory, in a nutshell, is that a crisis allows a single executive to commandeer all government authority without a specified time limit. The *Blueprint* implied a chronic-crisis doctrine – a doctrine that allows the executive to exercise unilateral control over the entirety of a government indefinitely. The chronic-crisis doctrine is insupportable because of its incompatibility with

constitutional government.

In theory, the State of California no longer defends the *Blueprint*, but in practice it continues to defend the same unconstitutional doctrine. The chronic-crisis doctrine is now embodied in the notion that the California Department of Public Health (CDPH) possesses the statutory authority to issue any order it deems necessary to address contagious disease. This is a doctrine that is not just unconstitutional, but acrobatically unconstitutional: the problem is the unconstitutional vesting of all the state government's power in the executive for an indefinite period, and the State cannot solve that problem by situating that unconstitutional agglomeration of power in a state agency.

California's historical experience – as well as that of other states and the federal government – weighs heavily against the validity and constitutionality of the chronic-crisis doctrine. In the case at hand, the Governor of California asserted broad authority over the course of several years, although the legislature was in session, by promulgating orders without public input or meaningful public notice. Those actions went outside the scope of executive authority contemplated by the state Emergency Services Act; those actions violated the separation of powers required by the Constitution; those actions ignored the state's tradition that its legislative branch is the dominant authority over its executive branch. In short, the chronic-crisis doctrine is untenable because it flouts constitutional constraints, and this is true whether the powers exercised issue formally from the Governor or from the CDPH.

## ARGUMENT

### I. There is no foundation for the chronic-crisis doctrine in California's Constitution, its caselaw, or its statutes.

The State's theory is that it currently holds powers in reserve under Health and Safety Code Section 120140 to take whatever measures it wants to protect the public from disease, with respect to any persons whatsoever, any property at all, and any places without limit – without having to demonstrate any particularized suspicion and without setting any time limit. That theory must fail. That is because the State's theory is inconsistent with existing statutes on quarantine and isolation: the State's interpretation of Section 120140 would render the provisions of existing state law that govern its quarantine and isolation powers surplusage, and furthermore such interpretation would jettison the constraints that already govern its existing powers of quarantine and isolation. It is impermissible to use the State's powers to quarantine and isolate in order to justify a broader set of regulations that govern businesses statewide.

The *Blueprint* has been jettisoned, but the chronic-crisis doctrine remains. CDPH now argues that Health and Safety Code Section 120140 authorizes it to issue orders that confine people to their homes *en masse* and block public access to businesses. This is wrong: of course, CDPH may use its powers to issue quarantine and isolation orders, but such orders require individualized assessment based on particular circumstances. CDPH, like every actor in government, is and must be constrained by the Constitution. The *Blueprint* memorialized an unconstitutional

overstretch of state power, but the State of California no longer relies on the *Blueprint* to exercise this authority. Nonetheless, its arguments imply that the CDPH still retains an open-ended authority in statute to issue any order that the agency deems necessary to respond to contagious disease. This theory is not defensible, whether it is intended to explain the powers of the Governor or the powers of the CDPH.

A quarantine is an *individualized* process: each instance of a quarantine takes into account the particular features and circumstances of some particular person or some particular set of persons (say, a nuclear family). See *Ex parte Culver*, 187 Cal. 437, 442 (1921) ("'Quarantine as a verb' means 'to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community.'" (citation omitted)). The statute that authorizes the administration of a quarantine emphasizes the individuality and particularity of the quarantine: Cal. Health & Safety Code § 120215(a) provides that health officers may "[e]nsure the adequate isolation of each case, and appropriate quarantine of the contacts and premises of an infected person." State regulations also define quarantine in terms of its exercise upon particular, specific individuals. *See* 17 Cal. Code Regs. § 2520 (defining quarantine as "the limitation of freedom of movement of persons or animals that have been exposed" and requiring a health officer to "determine the contacts who are subject to quarantine").

A quarantine therefore rests on an individualized, case-by-

case determination of particular facts and circumstances – in particular, the facts and circumstances that speak to whether some person or place has been exposed to a contagious disease. *See, e.g.,* Black's Law Dictionary (11th ed. 2019) (defining quarantine as "[t]he isolation of a person or animal afflicted with a communicable disease or the prevention of such a person or animal from coming into a particular area … ."); Black's Law Dictionary 976 (1891) (defining quarantine as "a period of time (theoretically forty days) during which a vessel, coming from a place where a contagious or infectious disease is prevalent, is detained … .") There are deep parallels here between a public health worker's individualized decision to quarantine someone and a police officer's individualized decision to detain or arrest someone; all such decisions require an individualized assessment of the particular circumstance that might justify state action. *See generally Beck v. Ohio*, 379 U.S. 89 (1964), *Terry v. Ohio,* 392 U.S. 1 (1968), *et seq.* These individualized decisions stand in sharp contrast to decisions about large numbers of people that might, for example, confine everyone's movement generally.

The predecessor to the modern Health and Safety Code statute similarly focused on individualized assessment as fundamental to quarantine decisions. Cal. Political Code § 2979a. California's caselaw also prohibits quarantine detention without evidence of individual affliction. In *In re Shepard,* 51 Cal. App. 49 (1921), a woman was arrested on suspicion of prostitution and then was later detained at a hospital for pretextual reasons: namely, the operation of a quarantine. The Court of Appeal determined

that the hospital detention was unlawful, because quarantine powers could only be exercised upon an allegedly diseased person if there was a " 'reason to believe' that such person is so afflicted." *Id.* at 51; *see also Ex parte Dillon*, 44 Cal. App. 239, 241 (1919) (person may not be detained under quarantine authority "without any knowledge being had on the part of the health department or its inspectors which would give rise to reasonable cause, or even suspicion, that the persons so detained are afflicted with contagious or infectious venereal disease").

Courts inside and outside California have emphasized the necessity of individualized assessment of facts and circumstances to justify quarantining people. Thus, in *Dillon*, the Court of Appeal declared that, "in view of the great concern of the law for the liberty of individuals," it was improper for public authorities to use their quarantine powers to restrain a person's free movement based on the bare assumption that the person had been exposed to a contagious disease; "for such detention to be legally justified, the return of the officer should show some further reason why the persons so detained are suspected of being afflicted." 44 Cal. App. at 244. Similarly, the federal district court, in *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 914 (W.D. Pa. 2020), found that a statewide shutdown order was "not a quarantine," because "[a] quarantine requires, as a threshold matter, that the person subject to the 'limitation of freedom of movement' be 'exposed to a communicable disease.'" (citation omitted). Instead, the Pennsylvania shutdown orders were an "unprecedented" mandate that could not be justified by quarantine or isolation authority.

CDPH's expansive interpretation of Health and Safety Code Section 120140 rests on the same indefensible ground that the State used when it previously defended the *Blueprint* and that it now has abandoned. In short, the central problem here is the attempt to vest all of the state government's power in the executive for an indefinite period, and that problem cannot be solved by situating that unconstitutional agglomeration of power in a state agency. The exercise of any government power necessarily has constraints, and those constraints cannot be evaded by assigning the power a new statutory address.

## II. The regulation of public health is a fundamental role of the legislature and not a fundamental role of the executive.

The State asserts that the Governor has authority under the Emergency Services Act to "promulgate, issue, and enforce such orders and regulations as he deems necessary," Cal Gov. Code § 8627, and more generally that he has traditional common law police powers to combat contagious disease through emergency action. This claim is an overbroad and mistaken reading of gubernatorial powers.

### A. There is no basis for the chronic-crisis doctrine that would grant the executive extraordinary powers without temporal limits either in California's or America's legal traditions.

No common-law tradition justifies the exercise of unilateral executive action during emergencies. Although some societies have relied on such authority, unrestrained by legislative checks or balances, that is not the American or Californian tradition.

In the ancient Roman Republic, the Senate would authorize

a single official to exercise power in times of emergency without the usual legal forms; this is the origin of our term "dictator." See Alan Greene, *Emergency Powers in a Time of Pandemic* 15 (2020). The United States rejected such practices. During the Revolution, the Continental Congress granted George Washington extensive authority over the management of the war, but as John Adams noted, "Congress never thought of making him dictator." Letter to Abigail Adams, Apr. 6, 1777, in 1 Charles Francis Adams, ed., *Letters of John Adams Addressed to his Wife* 206 (1841). When some Virginians suggested that the state appoint a dictator for the duration of the war, Thomas Jefferson—who was himself then serving as the wartime governor of Virginia—wrote indignantly against the "wretched" proposition, which he said could not be based on "any principle in our new [state] constitution, expressed or implied[.]" Thomas Jefferson, *Notes on Virginia* (1787) reprinted in Merrill Peterson, ed., *Jefferson: Writings* 252 (1984). A few decades later, the Louisiana Supreme Court could declare it well settled that American law included no common law tradition authorizing the executive to take unitary control in times of emergency. *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 534 (La. 1815).

During the Civil War, President Lincoln exercised unprecedented authority over the nation, even suspending the writ of habeas corpus. Yet he acknowledged that he did this only because the crisis prevented the assembly of Congress, and he therefore promptly called for a special session of Congress, which then ratified his actions. Brian McGinty, *Lincoln and the Court* 140 (2009). Lincoln's administration was hardly free of checks and

balances: Congress established a Joint Committee on the Conduct of the War, which aggressively oversaw the Administration's proceedings. See generally Bruce Tap, *Over Lincoln's Shoulder: The Committee on the Conduct of the War* (1998).

California's legal tradition is especially hostile to the idea of a single executive official exercising unchecked authority over the entire state. As compared to the constitutions of other states, California's Constitution creates an especially weak governor, in that it splits up and parcels out various executive functions to a relatively high number of executive officials (as compared to other states). California independently elects more of its executive officials than any other state, with the exception of North Dakota. Arguably, California governance is best understood as having a "plural executive" that operates more like a committee than like a governorship. Brian Janiskee & Ken Masugi, *Democracy in California: Politics and Government in the Golden State* 71 (3d ed. 2011). California's Governor cannot even spend money unilaterally—that is done by the Controller, who does not answer to the Governor. Cal. Const. art. XVI § 7. Even in "fiscal emergenc[ies]," the Governor cannot act independently; he or she must still call the legislature into session to address such an emergency. See Cal. Const. art. IV § 10(f). These facts of California governance support one writer's contention about the framers of California's Constitution: namely, its framers viewed the legislature as "the dominant branch with plenary power, while the governor was … certainly not a 'unitary' executive as envisioned in the federal design." David R. Carpenter, *On the Separation of*

*Powers Challenge to the California Coastal Commission*, 79 N.Y.U. L. Rev. 281, 298 n.84 (2004).

During the Spanish Flu epidemic of 1918, Governor William Stephens never attempted to exercise unilateral authority of the sort the current governor asserts. Instead, local officials took the lead in closing theaters, concert halls, and other places of large public gatherings. N. Pieter M. O'Leary, *The 1918-1919 Influenza Epidemic in Los Angeles*, 86 S. Cal. Q. 391, 394 (2004). Gov. Stephens implemented a voluntary mask order, *id*. at 401, but neither he nor any other official asserted power to dictate the conditions of operation for every business in the state. In other words, the *Blueprint* represents an assertion of authority that is "unprecedented in the history of our [state] and our Country" and that, before Covid-19, has "never been used in response to any other disease in our history." *Wolf*, 486 F. Supp. 3d at 916.

There is no place in the American common law tradition or in California's constitutional tradition that, in an emergency, the state's power can be exercised by a single individual who may write and enforce rules for an indefinite period. On the contrary, during an emergency, "the power of the governor extends to the enforcement of the constitution and law of the state only, not to … the substitution for them of arbitrary rules and orders under the pretence of 'executing' them." Henry Winthrop Ballantine, *Unconstitutional Claims of Military Authority*, 24 Yale L.J. 189, 206 (1915). Therefore, whatever power the Governor may have in this case must be traceable to specific statutory authority, not to the common law of state executive power.

### B. The Emergency Services Act gives the Governor the power to issue orders, but not to make laws.

The California Emergency Services Act assigns the Governor broad authority to suspend statutes, issue orders, and take other necessary actions – in an urgent and acute crisis. However, the Act does not allow the Governor the broader lawmaking power that would allow him or her to promulgate general and universal rules of indefinite duration.

The power to make rules for protecting public health is fundamentally a legislative power. Just about the entirety of the police power is concerned in some way or other with protecting public health and safety by setting rules for people to transact business and interact in a manner best suited to prevent them from harming each other—and the power to create such rules is legislative in nature. The executive can exercise that power only during episodes of urgency that make it impracticable for the legislature to act, and even then, that power must be subject to checks and balances that are governed by the test of necessity. In short, the executive may order others around during a crisis, but in the long term those orders are necessarily distinct from the statutes or caselaw that create collective expectations, reliance interests, or social order. *Cf. Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (regulatory action may interfere with "distinct investment-backed expectations"). The opposite view—that the executive can write general rules for the carrying on of business in society into the indefinite future, and can judge on his own whether the necessity exists for such an exercise of power—would be an extraordinary departure from

longstanding constitutional principles.

The Emergency Services Act contemplates a discrete, urgent incident in which the executive is compelled to take charge to address a short-term disaster. At such times, it is appropriate for the executive to issue commands. But commands—which the Act characterizes as "orders and regulations," Cal. Gov't Code § 8567—are not laws, and the executive never has authority to issue laws. Commands are addressed to particular people, are specific rather than general, and are limited by time. Such commands presume a managerial relationship between the government and the governed, rather than a presumption that the people are welcome to go about their business and plan for and execute their own lives. In contrast, laws are general rules of universal applicability that lay out expectations and duties for everyone; they presumptively have no expiration date.

Of course, it is sometimes difficult to distinguish between commands and laws, because sometimes such distinctions rest on matters of degree. But the shutdown orders of the past crossed the line into law, just as the State's expansive reading of Section 120140 threatens to do in the future. Those shutdown orders were not inherently temporary; in fact, for a time they were not accompanied by any expiration date. They were not specific but general. They purported to create a universal system of broad social duties and expectations, rather than a set of temporary managerial decisions that are briefly necessitated by emergency. In other words, those orders fell on the law side rather than the command side of the line. The upshot of all of this is that,

constitutionally, orders that cross the line into lawmaking are disallowed.

## III. When evaluating the Governor's use of emergency powers, the Court should build on the analysis used by the Michigan, Wisconsin, and Kentucky Supreme Courts.

### A. Michigan, Wisconsin, and Kentucky courts carefully weigh the need for urgent executive action against the importance of constitutional checks and balances.

Courts have addressed governors' use of extraordinary emergency powers in several recent cases. The three most relevant are *In re Certified Questions*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020), in which the Michigan Supreme Court declared the state's Emergency Powers of the Governor Act unconstitutional; *Wisconsin Legislature v. Palm*, 942 N.W. 2d 900 (Wis. 2020), in which the Wisconsin Supreme Court found that the state's Administrative Procedures Act applied to rules promulgated by the state's leading health official; and *Beshear v. Acree,* 615 S.W.3d 780 (Ky. 2020), in which the Kentucky Supreme Court rejected a nondelegation challenge to Kentucky's emergency statutes.

The Michigan case concerned two statutes: the Emergency Management Act (EMA) and the Emergency Powers of the Governor Act (EPGA). These statutes differed in significant ways. First, the EMA allowed the governor to proclaim an emergency and to issue emergency orders, but only for 28 days, after which the emergency declaration would automatically terminate unless expressly renewed by the legislature. See *In re Certified Questions*, 2020 WL 5877599 at *6. The EPGA, by contrast, contained no time limitation. *Id*. at *8.6.

Second, while the EMA allowed the governor to issue executive orders to suspend regulations and statutes, use the state's resources, take private property, direct evacuations, and do other things necessary to carry out the EMA's provisions, see Mich. Comp. Laws § 30.405, the EPGA gave the governor much broader authority to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." 2020 WL 5877599, at *8 (citing Mich. Comp. Laws § 10.31(1)).

In assessing the constitutionality of the two acts, the court used the federal test for delegation—i.e., whether the statute delegating authority included an "intelligible principle" that would limit the scope of the delegated authority—and also examined the "durational scope of the delegated power." *Id*. at *13- 14. The EMA passed this test, but the EPGA did not. The EPGA's "reasonableness" requirement did not qualify as an intelligible principle. Because the government lacks authority to act unreasonably to begin with, this reasonableness provision "place[d] a largely (if not entirely) illusory limitation upon the Governor's discretion." *Id*. at *16. And, unlike the EMA, the EPGA "authorize[d] indefinite exercise of emergency powers for perhaps months—or even years," which implied no real limit on the governor's authority. *Id*. It was therefore unconstitutional.

The Wisconsin case was brought by the state legislature, challenging the authority of the state's chief health officer to promulgate an order (called Order 28) which, among other things,

imposed a statewide shutdown of businesses and barred travel and private gatherings. *Palm*, 942 N.W.2d at 905 ¶ 2. In holding that this was a regulation subject to the rulemaking requirements of the state's Administrative Procedure Act (APA), the court was guided by the principle of constitutional avoidance. *Id*. at 917 ¶ 55. To "expansively read" the state's emergency management statutes to allow the officer to issue Order 28 without following the rules of the APA would amount to a "delegat[ion] [of] lawmaking authority to an administrative agency," which would raise serious constitutional problems. *Id*. Order 28 went "far beyond what is authorized" by the statutes because it applied not just to "those infected or suspected of being infected," but to "'[a]ll individuals present within the State.'" *Id*. at 916 ¶ 49. The court therefore concluded that Order 28 was the kind of regulation that the Executive could not adopt except through ordinary rulemaking procedures.

The Wisconsin court was mindful of the argument from urgency—but found it insufficient. The executive branch's power to act unilaterally in an emergency, the court said, is "premised on the inability to secure legislative approval given the nature of the emergency." *Id*. at 914 ¶ 41. If, for example, a fire threatened the capitol, "there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely." *Id*. Wisconsin's emergency statute—like the Michigan statute—included a time limitation (60 days). See *id*. at n.14. Two months

was "more than enough time to follow rulemaking procedures." *Id.* The idea that the executive could ignore those procedures during an emergency, with no time constraint, was "contrary to the law." *Id.*

Finally, the Kentucky Supreme Court ruled in *Beshear* that that state's emergency statute—and the governor's exercise of power under it—did not violate the state constitution's nondelegation doctrine. The court, however, emphasized that the state's legislature is "a part-time legislature" that can "only meet for sixty days every other year." 615 S.W.3d at 787, 807. This meant the legislature was "without the ability to legislate quickly in the event of emergency unless the emergency arises during a regular legislative session." *Id.* at 807. Also, the Kentucky Constitution permits, but does not require, the governor to call a special session—and the legislature has no authority to convene itself. *Id.* at 809. These factors mean that the Kentucky Constitution "tilts to authority in the full-time executive branch to act in [emergency] circumstances." *Id.* at 808. This authority was time-limited, however, because, pursuant to an emergency statute adopted during the pandemic, the legislature gave itself authority to determine on the first day of the next regular session whether the emergency still existed. *See id.* at 811–12.

Moreover, Kentucky's version of the "intelligible principle" test, which the emergency statute satisfied, *id.* at 810-11, provides for public notice of, and input regarding, regulations. *Id.* at 815. The court itself operated as an independent check—for example, it invalidated an executive order that barred family members from

sitting within six feet of each other at outdoor events. *Id*. at 824-25. The Kentucky Supreme Court expressly distinguished the Michigan decision in *In re Certified Questions*, noting that, unlike the Michigan EPGA, the Kentucky emergency statutes do not give the governor emergency powers "of indefinite duration," and that, unlike the Michigan legislature, the Kentucky legislature is not continually in session. *Id*. at 812.

### B. The principles of Michigan, Wisconsin, and Kentucky law imply that *Blueprint*-style executive actions cannot be valid delegations of legislative authority.

The law of Michigan, Wisconsin, and Kentucky, as described above, illuminates the best approach to the evaluation of claims of authority based on the chronic-crisis doctrine. In essence, that approach sums together the weight of:

(1) the duration of the governor's emergency authority,

(2) the scope of the asserted authority (relative to the statutory guidelines that limit it),

(3) the legislature's ability to convene and conduct business,

(4) the chronic nature of the crisis (whether a discrete incident like a fire or storm, or an ongoing crisis like a pandemic), and

(5) the extent of the absence of public accountability contained in the procedures governing the executive's orders.

The heavier that this metaphorical sum of five weights is, the more difficult it will be for the balance of powers implied by the Constitution to bear them.

### 1. Duration: California's Emergency Services Act imposes no meaningful time limit.

The California Emergency Services Act gives the Governor the power to maintain an emergency declaration until he revokes it or both houses of the legislature act. Cal. Gov't Code § 8629. Unlike the Kentucky statute, which expressly terminates an emergency declaration unless the legislature reinstates it upon reconvening, *Beshear*, 615 S.W.3d at 812, California's Emergency Services Act keeps an emergency declaration in place indefinitely. (There is one exception: orders that temporarily suspend statutes expire after 60 days. Cal. Gov't Code § 8627.5(b).) The Act is therefore much closer to the Michigan EPGA and Wisconsin's emergency statute than the Kentucky law along the dimension of time.

Furthermore, some versions of the *Blueprint* itself contained no provisions for expiration or any termination date. The successor policies of the Emergency Services Act are little better. The Emergency Services Act's requirement that the Governor must terminate emergency proclamations as soon as practicable is toothless; in practice, such a requirement allows the Governor vast discretion to decide how long any particular emergency lasts. The practicability requirement is a non-obstacle that, in effect, allows for what is reasonably labelled executive-branch lawmaking. Such state behavior is far closer to a (putative) law than to a command. But the Constitution and the Emergency Services Act contemplate the Governor issuing orders, not laws: that is because authorizing the governor to issue laws would be an unconstitutional delegation. *Clean Air Constituency v. Cal. State Air Res. Bd.*, 11

Cal. 3d 801, 816–17 (1974).

**2. Scope of Authority: The Governor purports to exercise extraordinarily broad emergency authority.**

The State offers two bases of authority to justify the chronic-crisis doctrine: Health and Safety Code Section 120140 and the Emergency Services Act, specifically Section 8627, which authorizes the Governor to "promulgate, issue, and enforce such orders and regulations as [the Governor] deems necessary." The State, quoting *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 146 (1976), interprets this as meaning that the Governor has the power "to impose reasonable regulations."

Yet as the Michigan Supreme Court noted in *In re Certified Questions*, 2020 WL 5877599 at *16, the "reasonableness" element is not a meaningful limit on the Governor's power. "The word 'reasonable,'" that court said, "is essentially surplusage" because "[i]t neither affords direction to the Governor for how to carry out the powers that have been delegated to [him] nor constrains [his] conduct in any realistic manner." Id.

Of course it is true that the Emergency Services Act gives the Governor extensive powers. But it does so with an eye to the Governor taking *urgent* and *specific* measures to address matters that an emergency prevents the legislature from addressing. So, for example, the Court of Appeal said in *California Correctional Peace Officers Association v. Schwarzenegger*, 163 Cal. App. 4th 802 (2008), that the Act gave Gov. Schwarzenegger authority to make special contracts with prison guards and others to expand prison facilities, due to a prison overcrowding emergency. It said

that "the need for additional space to house prison inmates" was "urgent" and "temporary," such that "the delay incumbent" in following the usual contracting procedures "would frustrate" the purposes of the law. *Id.* at 822 (citation omitted). Indeed, the standard hiring processes would "take approximately five years"—making the governor's unilateral action necessary. *Id.* at 822. Similarly, the medfly infestation presented an emergency warranting the governor's unilateral actions because pesticides had to be sprayed as swiftly as possible, and it was "not a time for uncoordinated, haphazard, or antagonistic action." *Macias v. State*, 10 Cal. 4th 844, 858 (1995). And in *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 118 Cal. App. 4th 861, 878 (2004), Gov. Davis's emergency order relating to the electricity shortage was authorized because it "expedite[d] the processing of applications for power plants by ensuring that the necessary environmental review of such proposals would be completed more quickly."

The case at hand, however, presents a sharp contrast in legislative circumstances. Here, Gov. Newsom cannot and could not assert authority based on urgency, expedition, or a need to avoid the delays of the legislative process—because the legislature was and is currently acting – and, in the case of the *Blueprint*, had been acting for months and months in the face of an alleged emergency. Furthermore, the Governor was asserting authority not to resolve some discrete aspect of the problem or to address an acute emergency—like licensing power plants, spraying pesticides, or signing contracts for prison guards—but was instead creating a

set of rules to govern how businesses operate into the indefinite future. In other words, although the Governor purported to be issuing "orders," he was actually exercising "authority to make fundamental policy decisions." *People v. Wright*, 30 Cal. 3d 705, 712 (1982). That is legislating, not addressing an emergency. The chronic-crisis doctrine that the state relies on would allow the Governor to invoke his emergency powers at his discretion and to impose emergency orders that persist to whatever length he chooses – and that is impermissible.

California courts have clarified that the Constitution's separation of powers clause "prevent[s] the combination in the hands of a single person or group of the basic or fundamental powers of government," *Coastside Fishing Club v. Cal. Res. Agency*, 158 Cal.App.4th 1183, 1204 (2008) (citation omitted), which means the legislature can "declar[e] a policy and fix[] a primary standard, confer[ring] upon executive or administrative officers the 'power to fill up the details,'" *id.* at 1205 (citation omitted)—but it cannot give a single official the power to write what are effectively laws governing the general carrying on of life into the indefinite future. See *Schaezlein v. Cabaniss*, 135 Cal. 466, 469 (1902) (legislature cannot "confer upon a single person the right arbitrarily to determine … that the sanitary condition of a workshop or factory is not reasonably good" and to penalize failure to comply with purported sanitary requirements); *People v. Lockheed Shipbuilding & Constr. Co.*, 35 Cal.App.3d 776, 784–85 (1973) (legislature also cannot give that power to an agency).

In sum, the proper analysis weighs the scope and duration

of the governor's power—the greater the scope of power delegated, the shorter the period should be, and vice versa. See *In re Certified Questions*, 2020 WL 5877599, at *13–14. Here, as in that case (but unlike in *Beshear*), the scope of authority the Governor could claim is extremely broad—broader than California legal tradition warrants—and the duration is indefinite. Thus, again, this case is more like the Michigan or Wisconsin cases than the Kentucky case.

**3. Legislative Operations: the California State Legislature is and has been up and running – before, during, and after the Covid crisis.**

Unlike Kentucky, California has a full-time legislature, which is in session for much more than 60 days. Covid didn't stop it from conducting business. If, as the Wisconsin Supreme Court put it, emergency delegations of authority to the governor are "premised on the inability to secure legislative approval given the nature of the emergency," *Palm*, 942 N.W.2d at 914, then there can be no basis for concluding that the emergency requires the governor—rather than the people's elected representatives—to promulgate rules for carrying on business in California. The California legislature remains in session, and there has never been any reason to believe the legislature could not or cannot exercise its lawmaking power generally.

**4. Character of the Crisis: the crisis was not acute, but chronic.**

The governor's emergency powers exist to address acute emergencies—but the *Blueprint* purported to set the rules for a "new normal" for the indefinite future, and the State now argues that Section 120140 gives it the authority to keep *Blueprint*-style

powers at the ready. Nonetheless, California courts have repeatedly rejected the idea that an executive declaration of emergency is immune from judicial scrutiny, see *Schwarzenegger*, 163 Cal.App.4th at 818; *Verreos v. City & Cnty. of S.F.*, 63 Cal. App. 3d 86, 101–05 (1976) (citing cases), and have explained that the "central idea" of an emergency "is that a sudden or unexpected necessity requires speedy action," *Malibu W. Swimming Club v. Flournoy*, 60 Cal. App. 3d 161, 166 (1976). Of course there is no bright line between acute and chronic crises, but if the executive's exercise of extraordinary powers rests on a need for immediate or speedy resolution that the legislative process cannot timely provide, then no such justification can apply here.

**5. Absence of Public Accountability: the Governor's policy choices are subject to little public accountability.**

As to the absence of public accountability, unlike the situation in Kentucky—where public comment was available, see *Beshear*, 615 S.W.3d at 815—Gov. Newsom's *Blueprint* was adopted without public input, and changes were sometimes made without any advance public announcement. For example, it was announced that one factor in determining whether counties could move from one tier to another would be the degree to which vaccines were being distributed within impoverished communities. This change was made without any public input, discussion, or disclosure until it was posted on the state's website. See *Blueprint for a Safer Economy, Cal. Dep't of Pub. Health*, March 16, 2021 version.

*  *  *

When we assess the factors laid out in the Michigan, Wisconsin, and Kentucky cases and apply them to the facts in California, the conclusion becomes inescapable: The assemblage of powers implied by the *Blueprint* exceeds the executive's emergency powers, because the *Blueprint* is simply lawmaking; this is true whether those powers are expressed in the *Blueprint* or justified by Section 120140. *Blueprint*-style lawmaking cannot be permitted, given its indefinite duration, its massive scope, and the legislature's presence and ability to pass any laws necessary to address outstanding public health issues; again, this is true whether those powers are expressed in the *Blueprint* or justified by Section 120140. It is improper for the executive to operate so as to deny the public its powers of notice and comment, and it is arguably even more improper for the executive to attempt to resolve matters in the legislative domain; again, the impropriety is more or less the same, whether it is expressed in the *Blueprint* or justified by Section 120140. In theory, the chronic-crisis doctrine encourages an extraordinary imbalance of power that is incompatible with California's constitutional law; in practice, the chronic-crisis doctrine enables the executive to cross the line into lawmaking and is therefore unconstitutional.

## CONCLUSION

This Court should reverse the Superior Court's decision that granted summary judgment to Respondents.

Respectfully submitted,

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## WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 6,095 words.

Dated: November 20, 2023

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